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August 16, 2006

## VIA FEDERAL EXPRESS

Mr. Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W., Room 700  
Washington, DC 20006

Re: **Finance Docket No. 33407**  
**Dakota, Minnesota & Eastern Railroad Corporation --**  
**Construction into the Powder River Basin**

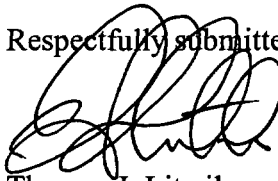
Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and ten copies of the **Reply of Dakota, Minnesota & Eastern Railroad Corporation to Motion of Mid States Coalition for Progress to Remove Highly Confidential Designation**, dated August 16, 2006.

One extra copy of the Reply and this letter also are enclosed. I would request that you date-stamp those items to show receipt of this filing and return them to me in the provided envelope.

If you have any questions regarding this filing, please feel free to contact me. Thank you for your assistance on this matter.

Respectfully submitted,



Thomas J. Litwiler  
Attorney for Dakota, Minnesota & Eastern  
Railroad Corporation

TJL:tl

Enclosures

cc: Richard H. Streeter, Esq.

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ENTERED  
Office of Proceedings  
AUG 17 2006  
Part of  
Public Record

BEFORE THE  
SURFACE TRANSPORTATION BOARD

\_\_\_\_\_  
FINANCE DOCKET NO. 33407

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DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION --  
CONSTRUCTION INTO THE POWDER RIVER BASIN

**REPLY OF DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION  
TO MOTION OF MID STATES COALITION FOR PROGRESS  
TO REMOVE HIGHLY CONFIDENTIAL DESIGNATION**

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**ATTORNEYS FOR DAKOTA, MINNESOTA &  
EASTERN RAILROAD CORPORATION**

Dated: August 16, 2006

ENTERED  
Office of Proceedings

AUG 17 2006

Part of  
Public Record



BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 33407

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION  
CONSTRUCTION INTO THE POWDER RIVER BASIN

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**REPLY OF DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION  
TO MOTION OF MID STATES COALITION FOR PROGRESS  
TO REMOVE HIGHLY CONFIDENTIAL DESIGNATION**

Dakota, Minnesota & Eastern Railroad Corporation ("DM&E") hereby replies in opposition to the motion of the Mid States Coalition for Progress ("MSC") to remove the "highly confidential" designation of the transcript of the August 14, 1998 deposition of Kevin V. Schieffer, DM&E's president, in this proceeding. MSC's motion is all of five sentences long (plus a string case law citation), and is both confused and confusing. Initially, we note MSC's erroneous assumption that the transcript is currently designated as "highly confidential" in its entirety. As MSC -- which was the party that took this deposition eight years ago -- should presumably know, much of the transcript is already designated as "public," and a portion of the rest is designated as "confidential" rather than "highly confidential." See Attachment 1 hereto (August 31, 1998 letter from DM&E counsel to MSC counsel with confidentiality designations).

Assuming that MSC seeks to reclassify both the "confidential" and "highly confidential" portions of the transcript as public, its perfunctory motion provides no clue as to what legitimate purpose that would serve for MSC. As noted, it was MSC that took this deposition, and it has been free to use the entire transcript during the long course of the Board's proceedings in this docket, with filings made under seal as necessary. MSC has no pending

requests for relief before the Board in this matter, and indeed no other party does either. Briefing in the current appeal before the U.S. Court of Appeals for the Eighth Circuit is nearly completed, and MSC was free to use the transcript in that appeal in any event -- again simply by filing any confidential information under seal.

The transcript is governed by a protective order that was proposed jointly by MSC and DM&E and adopted by the Board almost exactly eight years ago. Decision served August 5, 1998 ("PRB/Protective Order"). As the Board noted then, "[i]ssuance of the requested protective order will ensure that any material produced, in response to a discovery request or otherwise, will be used only in connection with the proceeding and not for any other business or commercial purpose." PRB/Protective Order at 1. While one could hypothesize motives not involving this docket and the pending appeal for MSC's motion,<sup>1</sup> they plainly would not be a cognizable or legitimate basis for the relief MSC seeks.

Having utterly failed to demonstrate or even allege a need for re-classifying the transcript, MSC fares no better in attempting to assert a basis for so doing. MSC predicates its motion on DM&E's inclusion of several transcript pages -- including some previously designated "highly confidential" -- with a public pleading in another STB matter.<sup>2</sup> Those portions of the transcript dealt with discussions between DM&E and I&M Rail Link, LLC ("IMRL") regarding

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<sup>1</sup> MSC says simply that the "entire contents" of the transcript should be "subjected to public scrutiny." MSC Motion at 1. Of course, any member of the public was free to participate as a party in this docket, and would have had access to the entire transcript under the terms of the protective order once the party signed the appropriate undertaking. The time is long since past for the solicitation of such parties by MSC.

<sup>2</sup> See Exhibit 3 of Petition of Iowa, Chicago & Eastern Railroad Corporation and Dakota, Minnesota & Eastern Railroad Corporation to Reopen and Partially Modify Conditions, filed May 12, 2006 in Finance Docket No. 34177, Iowa, Chicago & Eastern Railroad Corporation -- Acquisition and Operation Exemption -- Lines of I&M Rail Link, LLC and Finance Docket No. 34178, Dakota, Minnesota & Eastern Railroad Corporation and Cedar American Rail Holdings, Inc. -- Control -- Iowa, Chicago & Eastern Railroad Corporation.

interline arrangements for the movement of coal. While such testimony was plainly highly confidential in 1998, it should be evident why it is largely no longer so today: IMRL no longer exists as a rail carrier, and IMRL's rail lines are now owned by Iowa, Chicago & Eastern Railroad Corporation, a DM&E affiliate. The highly sensitive and confidential nature of commercial negotiations with third parties is obviously diminished here with respect to IMRL, even if some portion of the transcript related to IMRL might continue to require confidentiality. If MSC believes a specific confidential or highly confidential passage of the transcript should be made public, DM&E is open to discussion with them on that point. But a blanket motion to make the entire transcript open to the public clearly jeopardizes the legitimate rights and expectations of parties beyond just DM&E.

The protective order agreed to and jointly proposed by MSC and DM&E and subsequently adopted by the Board specifically provides that "[n]othing in this Protective Order restricts the right of any party to disclose voluntarily any Confidential Information originated by that party . . . ." PRB/Protective Order at 6, ¶ 15. MSC would have the Board find that, in exercising that right, a party destroys the applicability of the protective order to any other confidential or highly confidential information. That position has no logical or legal basis. DM&E's use of the transcript excerpts in another proceeding was expressly allowed by the protective order, and in no way changes that order or the confidential nature of any remaining portions of the transcript. MSC had an agreement with DM&E regarding the 1998 deposition, which lasted over 10 hours and covered a wide array of sensitive matters unrelated to IMRL. DM&E has lived by the parties' agreement, and MSC should as well. It would be contrary to public policy to allow MSC to undermine that agreement now.

MSC cites five cases to support its motion, all of which deal with waiver of the attorney-client or attorney work product privileges. What relevance the judicial treatment of such privileges has to the matters here is left to the Board's imagination. Documents protected by the attorney-client and work product privilege are never disclosed to other parties or to the court and cannot be used as evidence in the proceeding. They are either privileged in their entirety or not -- an attorney's letter to his or her client would seldom if ever be privileged as to one paragraph and not as to the next.

Protective orders and confidentiality designations before the Board, on the other hand, are used to ensure that commercially sensitive information is used only for legitimate purposes within the agency proceeding and is not inappropriately disclosed to outside interests. MSC (or its counsel) has had access to the entirety of the transcript for eight years, as did any other party signing the required undertaking and the Board itself. It is standard practice before the Board that a single piece of documentary evidence may be redacted or designated on a paragraph-by-paragraph, sentence-by-sentence, or sometimes even word-by-word basis (as when dollar amounts are redacted from an otherwise public document). The transcript here has contained public, confidential and highly confidential sections, as designated by DM&E, for eight years. The subsequent reclassification of certain information from the highly confidential category to the public category -- as specifically contemplated in the protective order -- has no conceivable relationship to the waiver of attorney-client or work product privileges that otherwise preclude the disclosure of entire conversations or documents to anyone.

MSC concludes by blandly seeking expedited consideration of its request, and predictably provides no reason for that either. MSC has had the undisputed right to review and rely upon the entire transcript for eight years, yet insists now after the agency proceeding has

concluded that the Board must move quickly to reclassify the transcript as public. DM&E respectfully requests that MSC's motion be denied.

Respectfully submitted,

By: 

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Thomas J. Litwiler  
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**ATTORNEYS FOR DAKOTA, MINNESOTA &  
RAILROAD CORPORATION**

Dated: August 16, 2006

**HARKINS CUNNINGHAM**

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August 31, 1998

BY HAND

George W. Mayo, Esquire  
Hogan & Hartson L.L.P.  
Columbia Square  
555 13th Street, N.W.  
Washington, DC 20004-1109

Re: Finance Docket No. 33407, Dakota, Minnesota &  
Eastern Railroad Corporation Construction into the  
Powder River Basin

Dear Mr. Mayo:

Enclosed is the original transcript of the deposition  
of Kevin Schieffer, taken in Brookings, SD on August 14, 1998.  
Mr. Schieffer has signed the transcript before a notary public,  
and attached to the transcript are his signed errata.

We have reviewed the transcript of this deposition and  
determined that the entire transcript can be declassified as  
"Public" except for the following:

CONFIDENTIAL

PAGE/LINE	TO	PAGE/LINE
20/14		20/23
45/8		45/15
78/17		80/25
93/25		97/15
103/19		105/16
346/9		349/4
351/19		352/8



**HARKINS CUNNINGHAM**

George W. Mayo, Esquire  
August 31, 1998  
Page 2

HIGHLY CONFIDENTIAL

PAGE/LINE	TO	PAGE/LINE
56/24		67/10
68/9		78/13
83/18		85/19
89/22		90/18
98/25		101/21
111/15		115/16
118/3		158/7
161/20		169/8
185/5		187/15
261/2		285/18
287/18		301/6
303/15		326/18
327/24		337/7
339/5		346/8
352/22		355/11

No change is being made to the confidentiality designations for exhibits to the Schieffer deposition.

Very truly yours,

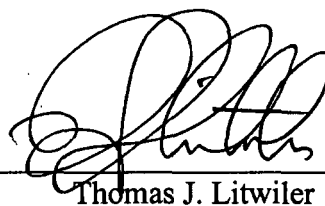
*David A. Hirsh*  
David A. Hirsh

Enclosures

**CERTIFICATE OF SERVICE**

I hereby certify that on this 16<sup>th</sup> day of August, 2006, a copy of the foregoing  
**Reply of Dakota, Minnesota & Eastern Railroad Corporation to Motion of Mid States  
Coalition for Progress to Remove Highly Confidential Designation** was served by overnight  
delivery upon:

Richard H. Streeter, Esq.  
Barnes & Thornburg LLP  
750 17<sup>th</sup> Street, N.W.  
Suite 900  
Washington, DC 20006-4675



Thomas J. Litwiler